SEGAR OIL PALM ESTATE SDN BHD

v.

TAY THO BOK & ANOR

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
SITI NORMA YAAKOB JCA
MAHADEV SHANKAR JCA
[CIVIL APPEAL NO: J-02-508-1996]
29 MAY 1997

CONTRACT: *Sale and purchase of land - Whether plaintiff entitled to avoid part of contract - Whether contract rescinded when plaintiff performed part of agreement*

CONTRACT: *Fraudulent misrepresentation - Whether agreement induced by fradulent misrepresentation - Whether agreement could be rectified and specific performance ordered*

The plaintiffs and the defendant entered into a Sale and Purchase agreement for 65.325 acres of land. It was not known to the plaintiff, until after the agreement was executed, that 17.60 acres of land were being used by TNB and the PUB for transmission cables and water pipes respectively. The plaintiffs through their lawyers requested for a postponement of the completion date to resolve the discrepancy, but it was rejected by the vendors who insisted on the completion date failing which the deposit would be forfeited. On the date of completion the plaintiffs tendered a cheque for an amount less the sum for the 17.60 acres but the cheque was returned. The plaintiff then sent to the vendors a cheque for the full balance which was refused by the vendors. The plaintiffs caused a writ to be filed against the vendors for rectification of the agreement and for specific performance of the rectified agreement or in the alternative to rescind the agreement and the deposit refunded to them.

The trial judge ruled that there was fraudulent misrepresentation and ordered that the agreement be performed without rectification and that the plaintiffs be given registerable transfers to all the titles and that damages to be assessed. The vendors appealed.

Held:
Per Mahadev Shankar JCA

[1] A party to a contract who alleges fraud cannot avoid one part of the contract and affirm another unless the parts are so severable as to be independant contracts.

[1a] The plaintiff's refusal to perform the contract on the completion day was a partial recission of the contract. This attempted partial rescission amounted to a total repudiation of the contract.

[1b] It was not the plaintiff's claim that time be extended because the contract should be specifically performed. It was wrong to extend time and order specific performance.

[2] The plaintiff's repudiation was accepted by the vendors when the latter terminated the contract. This was brought about by the vendors' misrepresentation and the keeping of the deposit would be an unjust enrichment. The deposit must be refunded to the plaintiff with interest.

[3] There was no award as to damages as this was not pleaded nor was it proven. Caveats over the land must be withdrawn and there would be no award as to costs.

[Plaintiffs' alternative prayer allowed but no award as to damages.]

*[**Bahasa Malaysia** Translation of Headnotes]*

***KONTRAK:** Belian dan Jualan - Tanah - Samada plaintif berhak untuk mengelak sebahagian daripada kontrak - Samada kontrak terbatal apabila plaintif melaksanakan sebahagian daripada perjanjian*

***KONTRAK:** Salah nyata fraud - Samada perjanjian didorong oleh salah nyata fraud - Samada perjanjian boleh diperbaiki dan perlaksanaan spesifik diperintahkan*

Plaintif-plaintif dan defendan-defendan telah memasuki satu Perjanjian Jual Beli bagi 65.325 ekar tanah. Plaintif telah tidak mengetahui, sehingga perjanjian tersebut disempurnakan, bahawa 17.60 ekar tanah telah digunakan oleh TNB dan PUB untuk kabel-kabel transmisi dan paip-paip air masing-masingnya. Plaintif-plaintif melalui peguam-peguam mereka telah meminta satu penangguhan bagi tarikh penyiapan bagi menyelesaikan perselisihan itu, tetapi ianya telah ditolak oleh penjual yang mendesak tarikh penyiapan, kegagalan yang mana akan menyebabkan deposit dirampas. Pada tarikh penyiapan plaintif-plaintif telah mengemukakan sekeping cek bagi satu jumlah yang kurang daripada wang bagi 17.60 ekar tetapi cek itu telah dikembalikan. Plaintif kemudiannya telah mengirimkan sekeping cek bagi baki sepenuhnya yang mana telah ditolak oleh penjual. Plaintif-plaintif telah menyebabkan satu writ difailkan terhadap penjual bagi pembetulan perjanjian tersebut dan untuk perlaksanaan spesifik perjanjian yang telah diperbetulkan atau secara alternatifnya untuk membatalkan perjanjian tersebut dan deposit tersebut dikembalikan kepada mereka.

Hakim perbicaraan telah memutuskan bahawa terdapat salah nyata fraud dan memerintahkan supaya perjanjian itu dilaksanakan tanpa pembetulan, bahawa plaintif-plaintif hendaklah diberikan pindahmilik-pindahmilik yang boleh didaftarkan bagi kesemua hakmilik-hakmilik dan bahawa gantirugi hendaklah ditaksirkan. Penjual telah merayu.

Diputuskan:
Oleh Mahadev Shankar HMR

[1] Sesuatu pihak kepada kontrak yang mendakwa fraud tidak boleh mengelakkan satu bahagian daripada kontrak itu dan sebaliknya mengikrarkan yang satu bahagian lagi kecuali bahagian-bahagian itu amat berasingan sehinggakan menjadi kontrak-kontrak yang bebas.

[1a] Keengganan plaintif untuk melaksanakan kontrak tersebut pada tarikh penyiapan adalah merupakan pembatalan sebahagian dari kontrak tersebut. Percubaan pembatalan sebahagian ini membawa kepada penolakan sepenuhnya kontrak tersebut.

[1b] Ianya tidak merupakan tuntutan plaintif bahawa masa seharusnya dilanjutkan oleh kerana kontrak perlu dilaksanakan dengan spesifik. Ianya salah untuk melanjutkan masa dan memerintahkan perlaksanaan spesifik.

[2] Penolakan plaintif-plaintif telah diterima oleh penjual-penjual apabila pihak yang terkemudian itu menamatkan kontrak tersebut. Ini telah disebabkan oleh salah nyataan penjual-penjual dan menyimpan atau menahan deposit itu akan merupakan pemerolehan yang tidak adil. Deposit tersebut haruslah dibayar-balik kepada plaintif-plaintif dengan faedah.

[3] Tidak terdapat award untuk gantirugi kerana ini tidak diplidkan atau pun dibuktikan. Kaveat-kaveat ke atas tanah-tanah tersebut semestinya ditarik balik dan tidak akan terdapat award bagi kos.

[Pohonan alternatif plaintif telah diberikan tetapi tiada award untuk gantirugi.]

Cases referred to:
Stickney v. Keeble [1915] AC 386 ***(refd)***
Topfell Ltd v. Galley Properties Ltd [1979] 2 All ER 388 ***(dist)***
Yap Hong Too & Anor v. Wong Ah Mei & Anor [1997] 1 CLJ 568 ***(dist)***

Legislation referred to:
Contracts Act 1950, s. 56(1)
Specific Relief Act 1950, ss. 30, 32

Other sources referred to:
Law of Contract, Chesire, Fifoot & Furmston, p. 430
Fraud and Mistake, Kerr, 7th Edn, pp. 515 & 517

Vendor and Purchaser, RM Stoneham, p. 815
The Indian Contract and Specific Relief Acts, Pollock & Mulla, 9th Edn, p. 458

[Appeal from High Court Malaya, Johor Bahru; Civil Suit No: 22-417-1988]

For the appellant - Pushpa Menon (A Navamani with her); M/s TS Chong & Co
For the respondent - M Pathmanathan (Gan Techiong & Shanti Pathmanathan with him); M/s Gan & Lim

JUDGMENT

Mahadev Shankar JCA:

The appellants (the vendors) were the registered proprietors of 65.325 acres of land (the said land) comprised in eleven separate titles, all in the Mukim of Kota Tinggi, Johor. On 16 May 1988 the respondents (the purchasers) entered into a sale and purchase agreement (the said agreement) with the vendors to buy the said land. The price agreed was RM7,000 per acre. The total purchase price was RM457,275. As agreed the purchasers paid a 10% deposit amounting to RM45,727.50. The completion date was fixed for the 16 August 1988. Clause 16 of the said agreement provided that time was to be of the essence of the agreement. Therefore the balance purchase price of RM411,547.50 had to be paid on or before 16 August 1988.

Before the purchasers executed the said agreement they were taken to see the said land by two persons said to be the vendors' agents. A pipeline reserve to facilitate the passage of three very large water pipes belonging to the Public Utilities Board Singapore (the PUB) traversed seven out of the eleven titles. These pipes carried water from Kota Tinggi reservoirs to Singapore. Alongside this reserve but affecting all eleven titles was a transmission cable reserve of Tenaga Nasional Berhad ('TNB') (formerly Lembaga Letrik Negara). This reserve was utilised for high tension cables and the pylons (the fixtures) used to carry them. Both the water pipes and the fixtures were so visible that it was impossible for anybody in the vicinity not to notice them.

However at the time of the visit the vendors' agents are said to have actively represented to the purchasers that the fixtures were in fact outside the said land. At or about the time the said agreement was executed this representation was repeated by the vendors' agents in the presence of the parties and the vendors did not do anything to correct the representation.

The titles to the eleven lots comprising the said land did not show any memorial registered thereon relating to these reserves.

The purchasers only took steps to check out the location of the fixtures after they executed the said agreement. Their surveyor advised them that contrary to the representation the said reserves and the fixtures thereon did in fact traverse the said land. The pipeline reserves took up 4.08 acres. The TNB's reserve took up a further 13.60 acres, making 17.60 acres in all.

The purchasers therefore took the view that they should only pay a price representing the value of 47.645 acres, since in their view the 17.60 acres was being used by the PUB and the TNB. On 4 August 1988 the purchasers' solicitors wrote to the vendors' solicitors that the actual area of the said land was less than 65.325 acres and requested that the completion date be postponed until a meeting had been held to resolve the discrepancy. The vendors replied on 9 August 1988 insisting that the land area to be transferred was 65.325 acres and that if the purchasers did not complete as provided by the said agreement on 16 August the vendors would exercise their rights under cl. 10 of the said agreement and forfeit the deposit.

On 13 August 1988 the purchasers' solicitors replied insisting that the purchasers were only prepared to pay for 47.645 acres which works out to RM332,515. After deducting the deposit of 10% they contended that completion should take place on payment of the nett balance of RM287,787.50. The vendors' solicitors did not respond.

On 16 August 1988 the purchasers' solicitors tendered a cheque for RM287,787.50 and demanded that the vendors transfer the eleven titles. The vendors refused. The cheque was returned the following day but the 10% deposit was forfeited.

Nothing happened after this until 22 October 1988 when the purchasers' solicitors unconditionally tendered the full balance of the contractual purchase price of RM411,547.50 and demanded that the said land be transferred to them. The vendors refused.

After another delay of more than two months the purchasers filed this writ on 28 December 1988.

The facts hereinbefore set out were pleaded in the amended statement of claim and buttressed by an allegation that the vendors by their servants or agents had dishonestly concealed from the purchasers before the said agreement was executed that the water pipes and the transmission lines aforesaid were in fact on the said land and that the PUB and the Lembaga Letrik Negara, (the LLN) had legally installed them there in circumstances of which the vendors had actual knowledge. In a nutshell the purchasers were alleging that the said agreement was induced by fraudulent misrepresentation.

The relief prayed for however was that the said agreement should be rectified so that the total purchase price should read RM333,515 "to express the real intention of the parties" and that the court should decree specific performance of the contract rectified as prayed for. Damages were also prayed for. There was an alternative prayer reading as follows:

> (iv) Alternatively, a declaration that the said agreement dated 16 May 1989 may be rescinded and the defendant refund the deposit plus damages:

The amended statement of claim does not allege any special damage suffered by the purchasers. Nor does the body of the statement of claim allege that by reason of the vendors' conduct complained of, the purchasers suffered any damage, and if so what that damage was. The claim for "damages" thus stands alone and isolated in the prayer.

The entire evidence of the plaintiffs was directed to show that the vendors had fraudulently misrepresented the location of the water pipes and the transmission lines as being outside the boundary of the said land. No evidence whatsoever was led to show that the purchasers had suffered any actual damage either special or general and if so what the monetary value of that damage was. This was the position when the plaintiffs' counsel **closed** the plaintiffs' case on 29 March 1996.

Consequently the vendors' evidence was also directed to rebutting the allegation of fraudulent misrepresentation and asserting that having put the purchasers on written notice on 9 August 1988 that the vendors insisted on completion taking place on 16 August and that forfeiture would follow failure to complete, the vendors were entitled to act has they had done.

In his final submission in the court below, counsel for the plaintiffs said nothing about any claim for damages. He confined himself to claiming that the said agreement be rectified so that the area to be paid for should be 61.245 acres.

The rationale for the reduction was that the evidence suggested that the PUB had acquired the 4.08 acres comprised in their reserve from the vendors' predecessors in title Messrs. Sin Hoa Realty Co. Ltd. and had paid the purchase price through the Collector of Land Revenue. Notwithstanding that there was nothing on the original or duplicate titles to show this acquisition it was submitted that the PUB should be regarded as the legal owners of their reserve. We would prefer to express no opinion on this aspect of the matter. As for the LLN reserve there was no suggestion that title to the land comprised therein had passed to LLN. This portion was 13.60 acres. In effect therefore the plaintiffs' contention in their final submission was that the contract should be rectified so that the area purchased should be 61.245 acres at RM7,000 per acre making RM428,715.

These submissions were made in the face of an insurmountable obstacle. The register documents of title (each of which is indivisible in the absence of sub-division) was for 65.325 acres in total. Any conveyance of these eleven titles would have resulted in the purchasers becoming the registered proprietors of 65.325 acres of land as per the titles. The purchasers at the end of the day, were asking the court to legitimise a transaction whereby they would pay for 61.245 acres but would acquire legal title to 65.325 acres as per the said agreement.

In a long and careful judgment the learned judge found as a fact that the vendors had misrepresented the true location of the PUB and the LLN fixtures. He further found that this misrepresentation was made fraudulently in that its objective was to induce the purchasers to enter into the said agreement on the basis that the fixtures were outside the said land. On the available material we are not disposed to disturb this finding.

However in deciding what the proper remedy was, the trial Judge's difficulties may well have been precipitated by the manner in which the case was presented and argued in the court below.

He declined to order rectification but instead ordered that the said agreement be performed by the payment of the full balance of the purchase price within one month from the date of the order. He further ordered the vendors to give the purchasers registrable transfers to all eleven titles within one month from the date of the order. And he ordered that damages be assessed on a date to be fixed by the Deputy Registrar. Upon completion of the transfers he suggested that the plaintiffs could take up matters with the relevant land authorities to make the relevant entries on the titles to reflect the existence of the PUB and LLN reserves.

These orders are not precisely worded but in effect the learned trial judge ordered specific performance of the said agreement in spite of the fact that the purchasers had elected to refuse to perform the agreement in accordance with its terms. Furthermore by inference the judge had literally rewritten the contract by overriding its specific term that time was of the essence. Damages were ordered to be assessed although no evidence had been led of any damages before the plaintiffs closed their case, and no issue as to damages had been raised in the plaintiffs' Counsel's final submission. Neither the PUB nor the LLN were parties to the action and their rights if any to be put on the title was not a matter to be taken for granted. The registered owners may well have been entitled to resist such a move *inter alia* because of the long delay and the court should not have pre-empted their rights.

The vendors appealed to us. There was no cross-appeal by the purchasers. So they have elected to have the High Court order left as it is.

After raising the question as to the circumstances in which a court can order rectification of a contract the learned trial judge set out ss. 30 and 32 of the Specific Relief Act 1950. He then went to analyse the evidence, rule out the need to entertain any suggestion of mutual mistake but found that the contract was induced by fraudulent misrepresentation. Unfortunately he did not then go on to consider whether rectification could be ordered. All he said after ordering specific performance of the said agreement was:

> I do not think under the circumstances that I should order rectification of the said agreement.

With respect it would be erroneous to suppose that in the circumstances of this case s. 30 of the Specific Relief Act 1950 had any application to this case. A contract may only be rectified to express the intention of **both** parties to the agreement. Illustration (a) to s. (30) sets out the appropriate parallel. Here the contract was for the transfer of the eleven titles containing 65.325 acres. Both parties intended to buy the said land. The purchasers' claim for rectification was that they should only buy and/or pay for 47.645 acres. In other words 17.60 acres should be taken out of the said agreement. However the vendors never intended to sell only 47.645 acres. Nor for that matter did the purchasers intend originally to buy 47.645 acres. The fraud in this case did not relate to the identity of the subject matter of the contract, but only to a part of its character. The reliance on s. 30 of the Specific Relief Act 1950 was therefore wholly misplaced. Unfortunately neither counsel nor indeed the trial judge went into the real significance of the passage cited from Chesire, Fifoot and Furmston's *Law of Contract* at p. 430. We will repeat it here with the necessary emphasis:

> It is a fundamental principle that the effect of a misrepresentation is to make the contract voidable and not void. This means that the contract is valid unless and until it is set aside by the representee. **On discovering the misrepresentation the representee may elect to affirm or rescind the contract.**

It is elementary law that a party to a contract, who alleges fraud, cannot avoid one part of the contract and affirm another, unless the parts are so severable as to be independent contracts. This proposition can be found in Kerr on *Fraud and Mistake* (17th Edn.) pp. 515 and 517 where the cases are set out. See also *Vendor and Purchaser* by R.M. Stoneham [194] at p. 815. The same proposition is repeated on *The Indian Contract and Specific Relief Acts* (9th Edn.) by Pollock and Mulla at p. 458 which reads:

> ... a man cannot rescind a contract in part only, when he decides to repudiate it, he must repudiate it altogether.

Having been put on notice on 9 August 1988 in no uncertain terms, the only option the purchasers had was either to perform the said agreement according to its terms, or repudiate it altogether and sue for damages for fraud.

The purchasers' attempt in October 1988 to revive the said agreement by tendering the full purchase price in return for transfer was a vain attempt to turn the clock back. We have noted that this tender was unqualified, and had it been so made on 16 August 1988 it may well have resulted in a waiver of the claim for damages. However the respective rights and liabilities of the parties in the circumstances of this case must be determined by what happened on completion day.

The purchasers' refusal on that day to perform the contract in part, was effectively a partial rescission of the contract by taking out **17.60** acres. The subsequent concession in the plaintiffs' closing submission to taking out only **4.08** acres sought to perpetuate the fallacy that the plaintiffs were legally entitled to a partial recession of an indivisible contract. What it totally overlooked was that if the contract was to be performed at all it must result in the transfer of the whole of the **65.325** acres.

In this context the relevant part of the judgment in the court below reads:

> It would seem that failure to observe time fixed by the contract for completion will be looked at upon a different light in equity if to do so would cause injustice, ie, the time fixed by the parties for completion will not be observed if to do so would cause injustice. **The evidence in the instant case shows that the plaintiffs have decided to affirm the said agreement when they decided to complete the purchase of the said land by preferring the full balance of the purchase price as agreed with full knowledge of the facts and misrepresentation.** The evidence show that they have paid a deposit of RM45,725.50 to the defendant which was subsequently forfeited by the latter and that they have incurred further expenses when they engaged the services of PW3 to survey the said land.

This is an error because far from affirming the contract on completion day the purchasers repudiated it. The vendors' acceptance of this repudiation brought the contract to an end. The cheque for the reduced amount was returned the very next day and the deposit was forfeited. The purported affirmation in October 1988 could not revive the said agreement.

Neither party cited *Stickney v. Keeble* [1915] AC 386 in the court below. Indeed it was never the plaintiffs' claim or submission that time should be extended because the said agreement should be specifically performed in

accordance with its terms. The trial Judge's reliance on this case was, with respect, misplaced because in that case there was no express provision that time should be of the essence. Nor was that case an action for specific performance or rectification. It concerned a purchaser who was claiming for the return of his deposit where the vendor was guilty of unnecessary delay (See Headnote). We think we should set out here the passages from the judgment of Lord Parker of Waddington which immediately follows the two paragraphs set out in the judgment of the trial judge, where Lord Parker said (see [1914] AC at 415 and 416):

> This is really all that is meant by and involved in the maxim that **in equity the time fixed for completion** is not of the essence of the contract, but this maxim never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties, when, for example, **the parties, for reasons best known to themselves, had stipulated that the time fixed should be essential,** or where there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as a non-essential term of the contract.
>
> It should be observed, too, that it was only for the purposes of granting specific performance that equity in this class of case interfered with the remedy at law. A vendor who had put it out of his power to complete the contract, or had by his conduct lost the right to specific performance, had no equity to restrain proceedings at law based on the non-observance of the stipulation as to time.

What is said in this case about the vendor applies equally to the purchaser. In our case the attempted partial recession on completion day amounted to a total repudiation of the contract. It was therefore quite wrong to extend time and order specific performance.

Before us Encik Pathmanathan, counsel for the respondents submitted that the purchasers' avoidance of that part of the contract which could not be performed was in accordance with s. 56(1) of the Contracts Act. He strenously argued that the PUB reserve and the LLN reserve should be regarded as land to which the vendors could not make good title and should therefore be taken out of the contract. With respect we think this attempt at partial recession was misconceived. Section 56(1) reads:

> 56(1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, **the contract,** or so much of it as has not been performed, **becomes voidable** at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

The words, "... the contract, **or so much of it as has not been performed** ..." refers to the contract to transfer the whole of the 65.325 acres of the said land. In the result if the purchasers were purporting to act under this section they had to avoid the whole of the contract. In the circumstances of this case "avoidance" is indistinguishable from "repudiation" or "rescission".

Respondents' counsel relied very heavily on *Topfell Ltd. v. Galley Properties Ltd.* [1979] 2 All ER p. 388. This decision which is at best of persuasive value is readily distinguishable. A man bought a house in an auction for £3,850. In doing so he relied on the auctioneer's representation that he would be given vacant possession of the ground floor. In fact there was a statutory notice which the defendant knew about prohibiting occupation of the ground floor because the upstairs was already occupied. So he sued for specific performance with an abatement of the purchase price, and succeeded. This case was not cited in the court below. Whereas *Topfell Ltd.* affirmed the entire contract and insisted it be performed, our purchasers repudiated the contract. Besides there was no provision in that contract that time was to be of the essence.

Respondents' counsel belatedly also handed us Y*ap Hong Too and Anor. v. Wang Ah Mei & Anor*. [1997] 1 MLJ 545. He must have thought it would support the action of the trial judge in overriding the "time of the essence" clause. This case is also readily distinguishable both on the facts and the law. The vendors by their own default made it impossible for the purchasers to pay the full balance of the purchase price until the lapse of two days from completion day. There was no question of repudiation by the purchasers. The court was giving relief against forfeiture.

Very different principles of law are at work in our case. Had the trial judge been properly addressed on the law he would not have ordered specific performance of the said agreement as is because this remedy was no longer open to the purchasers and in any case there was no such relief requested in the pleadings. Consequently the question of extending time for completion also did not arise.

Finally there is the question of the deposit. The purchasers' repudiation was accepted by the vendors when they terminated the contract on 16 August 1988. This situation was brought about by the misrepresentation of the vendors. For the vendors to retain the deposit in the face of the finding of fraud would be an unjust enrichment which we cannot permit. In accordance with the respondents' alternative prayer, we therefore ordered it be refunded with interest at 8% per annum from date of filing of writ on 18 December 1988 up to realisation. We did not make any separate award for damages because none was pleaded or proven in the court below. Rescission and damages for

deceit for fraudulent misrepresentation may be cumulative remedies but recovery under either head requires proper pleadings and proof. The plaintiffs' counsel closed his case without providing either and we do not think it right to reopen the issue of damages to be assessed as was done here.

The purchasers' caveats had to go. In allowing this appeal, we did not order costs because we disapproved the vendors' manner of inducing the purchasers to enter into this contract. If they were going to rely upon the rule of *caveat emptor* they should have made that clear to the purchasers – as is where is – instead of making positive assertions which they ought to have known were false. However we directed the security deposit for costs paid into court to be refunded to the appellants. We hope that the measure of interest we have ordered will go some way to assuaging any sense of grievance the purchasers may feel about how all this has ultimately turned out.

Reported by Anne Soh